United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4046

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

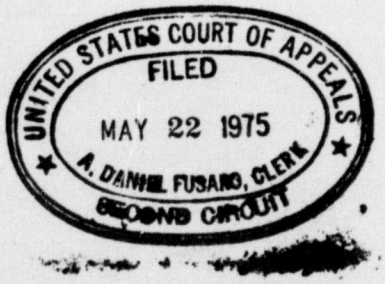
Respondents,

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., et al.,

Intervenors.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.



Arthur Scheiner
Richard A. Solomon
Robert D. Hadl
Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036

Attorneys for
Aerospace Industries Association
of America, Inc.

May 21, 1975

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Questions Presented

In this case the American Telephone and Telegraph Company ("AT&T") seeks review of a Memorandum Opinion and Order of the Federal Communications Commission which rejected tariff filings based on a rate of return of 10.5-11.0% designed to increase interstate rates by $717 million. The Commission held that the proposed rate filing was unlawful under Section 205 of the Communications Act because it was based on a rate of return in excess

of 8.5% prescribed by the Commission in 1972. The Commission, however, authorized AT&T to increase its rates by $365 million to reflect the economic change since 1972 in embedded debt costs and set for expedited hearing the issue of whether its rates should be increased to also provide the claimed increase in return on equity.

The question presented is:

Whether the Commission has authority to enter an order, after full hearing, prescribing a rate of return of 8.5% for AT&T and authorizing rate schedules to be filed based on such return, thereby precluding AT&T from filing unilaterally, and without prior Commission approval, new and higher rate schedules intended to permit it to realize a rate of return of 10.5-11.0%?

Counterstatement of the Case

In accordance with the Court's direction to the parties to avoid duplication and repetition, (Preargument Conference Order, April 21, 1975), Aerospace Industries Association of America, Inc. ("AIA") hereby adopts the Counterstatement contained in the brief of the Federal Communications Commission ("FCC"). The interest of AIA in this case is detailed in the record at A. 138-39.[1/]

1/ (A. ___) references are to the Joint Appendix.

Argument

Introduction and Summary

The provisions of the Communications Act, like those of a number of other federal regulatory statutes providing for rate regulation, [2/] make a clear distinction between "carrier made" rates and "commission made" rates. The statutory scheme is that unless and until the agency determines the appropriate rate for a regulated company after full proceedings, the company, within defined limits of notice and suspension, is permitted to put into effect new "carrier made" rates. Once such a final agency determination has been made, however, rate changes inconsistent therewith can only be made effective after an appropriate agency order authorizing such action. Otherwise an agency's prescription of rates after a lengthy hearing could be nullified by a carrier filing of new and higher rates than those prescribed and putting them into effect after the limited notice or suspension periods applicable to the very different procedures involving carrier made rates. Permian Basin Area Rate Cases, 390 U. S. 747, 778-79 (1968); United States v. Corrick, 298 U. S. 435, 439-40 (1936); Arizona Grocery Co. v. Atchison T. & S. F. Ry Co., 284 U. S. 370 (1932).

2/ See, e.g., Natural Gas Act, Sections 4(e) and 5, 15 U. S. C. §§717c(e), 717(d); Interstate Commerce Act, 49 U. S. C. §§15(6) and (7); American Telephone and Telegraph Co. v. FCC, 487 F. 2d 865, 873-74, 876-81 (2d Cir. 1973).

The rationale restricting the ability of a carrier to change "commission made" rates without prior commission approval is applicable pro tanto in situations where the agency rate prescription does not purport to govern all facets of a carrier rate increase but is limited, as in the present situation, to a prescription of the appropriate rate of return upon which the carrier is then authorized to file rates to achieve the prescribed earnings level. The Commission is not bound to issue a final order resolving all issues presented by a rate filing at one time, but may properly adjust the rates to the demands of a fair return before considering all other questions presented by a rate filing as to the level and structure of the rates. Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962); Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942). Thus, the conclusion of the first phase of a rate investigation involving the determination of a just and reasonable earnings level for a carrier, including an authorization to file rates predicated on the determination of a fair return is within the meaning of the relevant statutory provision authorizing the agency to prescribe rates.

A contrary result would rob the Commission's decision here setting 8.5% as the reasonable and fair rate of return of any practical force and effect. If AT&T could nullify the decision by the filing of new rates based on a higher rate of return and subject only to the statutory notice and suspension provision, then the two stage approach to rate proceedings, specifically

approved by the Supreme Court, and absolutely essential if the Commission is to effectively regulate the massive interstate telephone system, would be of little value. As the Supreme Court said in rejecting the filing of higher rates in comparable circumstances:

> [w]e are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes. Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968).

The Commission's 1972 decision comprises all the essential elements of a "prescription" order within the meaning of Section 205 of the Act. It was entered after a full opportunity for hearing and plainly was based on a finding that 8.5% was the "just and reasonable" rate of return which should be made effective for AT&T. Thus, the statutory requisites for a prescription order were present, American Telephone and Telegraph Co. v. FCC, 449 F.2d 439 (2d Cir. 1971). Furthermore, as this Court recently stated:

> ... to determine whether rates have been prescribed the actual impact of agency action and not its form is decisive. American Telephone and Telegraph Co. v. FCC, 487 F.2d 865, 874 (2d Cir. 1973).

Judged by any standard, the "impact" of the Commission's 1972 decision was to circumscribe AT&T's discretion to file rates except those designed to achieve the earnings level fixed by the Commission. As such, the Commission's order must be considered a "prescription" within the meaning of the statute. Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

I. AT&T Does Not Have an Unlimited Right to File Rate Increases

AT&T's claim (Br. pp. 15-28) that a statutory rate filing provision such as Section 204 of the Communications Act, 47 U.S.C. §204, gives it the unlimited right to file and put into effect new rate increases has been rejected by the decisions of this Court and the Supreme Court. Indeed, AT&T's reliance upon this Court's decision in American Telephone and Telegraph Co. v. FCC, 487 F.2d 865 (2d Cir. 1973) is wholly misplaced.

At issue in that case was the Commission's "special permission" requirement which placed a "freeze" on the filing of new rates by AT&T prior to any Commission determination of their lawfulness. It was, in effect, an attempt to preclude the carrier from filing new rates without giving it the full opportunity for hearing or requiring the Commission to make the basic findings essential for "commission made" rates under Section 205. Such a requirement was struck down by this Court on the ground that it violated the statutory dichotomy of "carrier made" and "commission made" rates. By invalidating the "special permission" requirement, this Court did not rule, however, that Section 204 and 205 of the Act granted AT&T an unlimited right to file rate changes. Indeed, it recognized that Section 205 "compels the carrier to adhere to a fixed rate which can be revised only with prior Commission permission" (Id. 487 F.2d at 874). Thus, rate prescriptions are entirely proper when made according to the

statutory formula, and carriers do not have an unlimited and unilateral right to revise their tariffs.

The Supreme Court has explicitly recognized that where an agency prescribed just and reasonable rates, such rates become the only lawful rates and remain so until further order of the agency. United States v. Corrick, 298 U. S. 435, 439-440 (1936); Arizona Grocery Co. v. Atchison T. & S. F. Ry. Co., 284 U. S. 370 (1932). The rationale underlying this rule was set forth in Permian Basin Area Rate Cases, 390 U. S. 747 (1968), where the Court approved a moratorium on the filing of new rates in excess of those prescribed by the Federal Power Commission in area rate proceedings (390 U. S. at 777-779):

> The validity of the moratorium order turns principally upon construction of §§ 4 and 5 of the Act. Section 4(d) provides that no modification in existing rate schedules may be made by a natural gas company except after 30 days' notice to the Commission. When the Commission receives such notice, it is permitted by § 4(e), upon complaint or on its own motion, to suspend the proposed rate schedule for a period not to exceed five months. The Commission is to employ the period of suspension to conduct hearings upon the lawfulness of the proposed rates. If at the end of the suspension period appropriate orders have not been issued, the proposed rate schedule becomes effective, subject only to a refund obligation. In contrast, § 5(a) permits the Commission, upon complaint from a public agency or a gas distributing company, or on its own motion, to conduct proceedings to determine whether existing rates are just and reasonable, and to prescribe rates "to be thereafter observed and in force ..." These investigatory powers are not conditional upon the filing by a natural gas company of any proposed change in existing rates.

> Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They assert that the period of effectiveness of a rate determination under § 5(a) is limited by § 4(e); they reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away." 34 FPC, at 228. (Footnotes omitted)

Exactly the same rationale is applicable to the provisions of Section 204 and 205 of the Communications Act of 1934, 47 U.S.C. §§204, 205. Accordingly, AT&T's claim of an unlimited right to file rate revisions must be rejected as inconsistent with the decisions of the Supreme Court and this Court.

II. The Commission Has Authority Under Section 205 of the Act to Divide a Rate Investigation Into Two Stages and to Issue an Order at the Conclusion of the First Stage Prescribing a Rate of Return Where Rates Consistent with the Prescribed Earnings Level are Determined and Authorized by the Commission

AT&T argues that there is no statutory authority to prescribe a rate of return, under Section 205 of the Act.[3/] AT&T reads Section 205, and particularly the word "charge" in a limitative fashion as applying only to a specific rate. We submit that a broader interpretation is required if the Commission is to fulfill its statutory mandate; and that Section 205 applies to an order of the Commission which prescribes a specific earnings level upon which just and reasonable rates are determined and authorized by the agency.

3/ Section 205 of the Communications Act provides in pertinent part:

> (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed,...

A. The Commission Has Authority to Divide a Rate Investigation into Two Stages

The Supreme Court has specifically held that an agency operating under statutory provisions analogous to the Communications Act is not bound to issue a final order resolving all issues presented by a rate filing at one time, but may properly adjust the rates to the demands of a fair return before considering all other questions presented by a rate filing as to the level and structure of the rates. Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962); Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942). In the Natural Gas Pipeline case, the Federal Power Commission (FPC), after a full hearing on the question, ordered two companies to reduce rates by $3,750,000 based on a determination that their fair rate of return was 6.5% and that the companies had been earning a return in excess of 8%. In the Supreme Court, the companies contended that the FPC had no authority under the Natural Gas Act to enter an interim order reducing rates and that the order was invalid because the FPC did not itself fix specific reasonable rates but instead merely directed the companies to file new rate schedules which would result in the prescribed reduction in operating revenues.

The Supreme Court rejected this argument stating:

> The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair

> return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modelled on the provisions of the Transportation Act, 49 USCA §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. 315 U. S. at 584.

In the Tennessee case, the Supreme Court expressly reaffirmed its holding in Natural Gas Pipeline. In Tennessee, the FPC was faced with a request for a general rate increase by a major pipeline for six different rate zones. The increase was predicated on a 7% rate of return. Tennessee argued that the rate of return issue should be decided simultaneously with the issue of cost of service and allocation of rates among zones. The FPC rejected this argument and issued an interim order finding that the 7% return was excessive and that a 6 1/8% return was just and reasonable. Accordingly, Tennessee was ordered to file reduced rates reflecting the decrease.

The Supreme Court upheld the FPC stating "there is 'no question' as to the Commission's authority to issue interim rate orders," 371 U. S. at 150. Further, it found no difference from the Natural Gas Pipeline case even though the proceeding had been instituted by a pipeline rate filing under Section 4(e) of the Natrual Gas Act -- comparable to Section 204 of the Communications Act -- rather than by the Commission itself under Section 5 of the Natural Gas Act -- comparable to Section 205 of the

Communications Act.[4/] Nor did the Court have any doubts about the efficacy of the two-step procedure invoked by the FPC (371 U. S. at 153-54):

> The Commission has found that the revised over-all rate schedule should have been calculated on a rate of return of 6 1/8% rather than 7%. As a result the over-all rate was to that extent unlawful and refunds were due across the board to all customers in the Tennessee Gas system. The interim order directed their payment. True, the old and undecided zone rate structure under attack as discriminatory was left in effect by this order and survives a bit longer. But the probabilities present in that situation are more than offset by the certainty of the Commission's actions in finding the 7% rate unlawful, fixing the 6 1/8% lawful return and giving timely effectiveness, including refunds, to the latter. Perhaps discrimination may later be found in the allocation of cost between some zones, but it would affect only the customers in those zones while the postponement of the interim order here would be of continuing detriment to all customers in all zones. Moreover, if decreased rates and resultant refunds are later found to be necessary in those isolated instances the Commission has the power to so order upon such findings and the individual lawful rates could at that time be fixed.

In sum, the Supreme Court found that "the Commission's ultimate action in directing the severance [of the proceeding into two stages] and in entering

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4/ Section 204 of the Act provides that where the Commission holds a hearing on a carrier proposed rate it can, after the hearing, "make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." In other words, a Commission determination of the propriety of a carrier's rates after hearing constitutes agency made rates regardless of whether the investigation was initiated by the carrier or the agency.

the interim order was not only entirely appropriate but in the best tradition of effective administrative practice," 371 U. S. at 155.[5/]

B. The Commission Properly Exercised Its Authority Under the Statute

Here the Commission decided to divide its investigation of the lawful level of AT&T's rates into two phases. AT&T, 27 FCC2d 151. Phase I was devoted to the question of rate of return and Phase II was devoted to other matters that could affect the revenue requirements of AT&T such as the reasonableness of the prices of the Western Electric Company, the amounts claimed for investment and operating expenses and the reasonableness of the rate structure, 27 FCC2d at 156-57, 161-62; see also, AT&T, 38 FCC2d 213, 216. The Commission made clear that by dividing the proceeding into two phases it was not precluding the possibility of "rate adjustments at the end of the first phase" by a "Final Decision" which would be effective, "pending the outcome of the further hearing on questions related to expenses, rate level and structure, and other associated matters," 27 FCC2d at 157.

The Commission completed Phase I of its investigation and issued

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5/ There is no basis for any suggestion that only rate design matters may be left for subsequent determination. As in the present case, the Commission may determine the appropriate rate of return and order rates to accomplish this determination, even though it has not yet determined rate base and operating expense issues, as long as the new rates it authorizes are based upon the carrier's claims as to rate base and operating expense.

its final decision on November 22, 1972, AT&T, 38 FCC2d 213. Based upon its careful and fully documented analysis, the Commission rejected AT&T's claims for a rate of return of 9.5%, including a return on equity of at least 12.5% (see 38 FCC2d at 221). Instead it concluded that "the minimum rate of return that Bell should be permitted to earn on its interstate operations at this time is 8.5%." 38 FCC2d at 245. While the Commission opinion thus fixed 8.5% as the minimum rate of return, it also established a "range of reasonableness" of .5% for Bell's earnings under the proposed tariff rates for improved efficiency or productivity gains. Thus, any future increases in AT&T's earnings at the tariff rates it authorized AT&T to file to achieve the 8.5% return, and up to 9.0%, would, if based on either of these factors, "be acceptable without regulatory action on our part," 38 FCC2d at 245.

The rates which the Commission authorized AT&T to file to achieve the 8.5% return were calculated to produce $145 million of earnings before federal income tax. This increase was in addition to the $250 million the Commission had already permitted AT&T to file and which became effective in January, 1971.[6/] The approach used by the Commission in arriving at the $145 million figure was based on an analysis of AT&T's then current operating data and plant investment. The Commission found that AT&T's

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6/ The rate increases filed by AT&T in November, 1971, however, designed to produce increased earnings of $545 million before federal income taxes, were cancelled and declared null and void.

earnings level at the rates made effective in January, 1971, was approximately 8% and that, based on the average net investment devoted to interstate operations, $29 million of additional net income before federal income taxes was required to increase AT&T's interstate earnings ratio by one-tenth of a percentage point. Hence to reach five-tenths of a percentage point, or 8.5%, an additional $145 million in revenues was required (38 FCC2d at 250-51).

In short the Commission did not merely determine a fair rate of return for AT&T. It went much further. It applied the rate of return to AT&T's current revenue data and then arrived at a figure which it determined was the appropriate amount by which interstate earnings could be increased on the assumption that the remaining portion of the company's cost of service presentation was valid. Rate schedules reflecting only this limited increase were authorized. Thus, as the Commission had intended in starting the two part investigation, 27 FCC2d at 157, its decision at the end of Phase I "result[ed] in [commission-made] rate adjustments," and not only an interlocutory order for future application.

Under these circumstances we submit that the Commission fully exercised its authority under Section 205 to prescribe "charges." It did not decide the rate of return issue in a vacuum. The figure 8.5% was not left dangling in the air. It was applied to AT&T's current revenue data and plant investment, assuming the validity of AT&T's figures, to arrive at the revenue level on which rate schedules were authorized.

At the same time the Commission did not prescribe specific rates for the different classes of service offered by AT&T. This rate design determination was deferred pending a final decision on the rate level questions involved in Phase II of the Commission's investigation (still not concluded) and in the rate design proceedings in Docket 18128. But the refusal to prescribe specific rates for the different classes of service does not mean that the Commission's decision did not constitute the prescription of a charge within the meaning of the statute. 7/

A contrary result would rob the Commission's decision of any practical force and effect and would nullify the two stage approach to rate proceedings. As the Supreme Court said in rejecting the filing of higher rates in comparable circumstances:

> [w]e are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes. Permian Basin Area Rate Cases, 390 U. S. 747, 780 (1968).

Indeed, AT&T while arguing that the Commission is without authority under

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7/ AT&T argues that its continuing liability for accounting and refunds means that the Commission's rate of return decision could not have amounted to a prescription order. Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry., 284 U. S. 370, 390 (1932). The Commission made clear, however, that an accounting order was necessary to insure that the decision in Phase II and Docket 18128 could be meaningfully applied if discrimination were later found between different classes of service. Cf., Federal Power Commission v. Tennessee Gas Transmission Co., 371 U. S. 145 (1962).

Section 205 to prescribe and apply a rate of return, wholly fails to suggest the statutory provision under which the Commission does have authority to issue binding rate of return orders. Obviously, AT&T would not have concurred in a $150 million reduction in its filed rates in 1972 if it had been of the view that the Commission lacked authority to direct such action. 8/

Further, while AT&T states that the Commission is without authority to prescribe a rate of return under Section 205, it points to no case holding that such authority does not exist. The cases cited by AT&T (Br. pp. 35-36) to support the proposition that an agency authorization to file general rate increases does not constitute a prescription of rates are simply not apposite. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), the very same cases were relied upon by the Civil Aeronautics Board to argue that a particular agency action did not constitute a "prescription" of rates. The Court rejected the argument with respect to the cases stating:

> We are not dealing with rates filed by carriers which the Board has refused to suspend, or even with allowance of small percentage increases in revenue based on existing rates ... The Board has pointed to no case in which the Board or Commission has set out such a

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3/ The rate schedules filed in 1970 designed to produce $545 million in additional earnings before federal income taxes were declared null and void and AT&T was permitted to increase rates by $395 million (i.e., the $250 million increase granted pending the outcome of the Phase I proceeding and the $145 million increase permitted as a result thereof).

> complete and detailed scheme for making rates which it wanted filed and in which a Court has held that the resulting rates were carrier-made rates. Even a cursory reading of the order makes it clear that the Board told the carriers what rates to file ... (Footnotes omitted), 430 F. 2d at 898-99.

In sum, we submit that the Commission properly exercised its authority under Section 205 where, as here, its prescription of a rate of return for AT&T was coupled with a determination and authorization to file rates to achieve the prescribed earnings level.

III. The Commission's 1972 Decision Contained All The Essential Elements of a Prescription Order

The essential elements of a "prescription" order have been detailed by this court: they include a "full opportunity for hearing" and a finding that the rates so prescribed are "just and reasonable." American Telephone and Telegraph Co. v. FCC, 449 F.2d 439 (2d Cir. 1971); National Association of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972). Furthermore, as this Court recently stated:

> ... to determine whether rates have been prescribed the actual impact of agency action and not its form is decisive.

American Telephone and Telegraph Co. v. FCC, 487 F.2d 865, 874. See also Moss v. CAB, supra.

Here the full opportunity for hearing was clearly provided. An extensive hearing record was compiled including testimony, exhibits, proposed findings of fact and briefs. Thereafter, an initial decision by a Hearing Examiner was rendered, exceptions were filed and oral argument held before the Commission en banc. AT&T was a party at each and every stage of the proceeding and participated fully. It plainly had a fair and full opportunity to be represented and to appear in all stages of the investigation.

Further, the Commission's decision makes plain that it considered a rate of return within the 8.5-9.0% range as just and reasonable. It specifically denominated such a return "as the range of reasonableness" and in authorizing rate schedules of $145 million stated that "an earned rate

of return within this 8.5-9.0% range at these tariff rates would be considered by us to be reasonable." 38 FCC2d at 245.

We submit it is unnecessary, however, to comb the Commission's decision to find detailed examples of the use of the words "just" or "reasonable." The Commission's decision makes evident that it was intended to circumscribe AT&T's discretion to file rates other than those designed to achieve the earnings level fixed by the Commission. Does AT&T seriously suggest that it could have refiled the original tariff schedules proposing an increase in earnings of $545 million before federal income tax? These were specifically cancelled and declared null and void by the Commission. Does it claim that it could have filed tariff schedules to produce an increase in earnings between the $545 million figure and $145 million? We think not. Judged by any standard we submit that the Commission's decision offered AT&T no discretion as to the amount of the increase it could file. And if conduct is any guide to meaning, AT&T promptly responded by filing new rate schedules precisely to meet the Commission's order. Under these circumstances, the Commission's 1972 decision contained all the essential elements and had the impact of a prescription order.

IV. The Commission Gave Due Regard to Changes in Economic and Financial Conditions

AT&T's claim (Br. pp. 36-41) that a rate of return prescription is not binding prospectively without regard to changes in economic and financial conditions completely misses the point. The Commission did not ignore AT&T's filing because it had previously prescribed a lower rate of return than the one sought herein. Instead, it carefully considered the showing made by AT&T. With respect to that portion of its claimed higher return based on alleged increases in its embedded debt costs, the Commission permitted AT&T to file higher rates totalling approximately $365 million in additional gross revenues before federal income taxes which it allowed to become effective without suspension, or any hearing in which the complaining customers, including AIA, could challenge the propriety of the increase. It was only with respect to that portion of the increase based upon an alleged increase in the cost of equity, that the Commission refused to permit a filing which would become automatically effective within three months. The Commission found that "while recent trends in the economy would indicate that the cost of equity may no longer be 10.5%, Bell has failed to show clearly whether and to what extent the cost of equity now exceeds 10.5%. This question must be tested in the crucible of an evidentiary hearing ..." (A. 11). And even with respect to this inadequate showing, the Commission not only provided for an expedited hearing geared towards a prospective decision to be issued within nine months, but provided that if

such decision was not forthcoming by this date, AT&T could put the higher rates into effect.

As AIA has argued in its petition for reconsideration of this order, the Commission should have put the new filing into effect only after the sixty day notice period provided in its rules, should have suspended the filing for an appropriate period based on responses to the filing and should have entered a protective accounting and refund order. 9/ We remain of this belief. But in any event it cannot and certainly has not been demonstrated by AT&T that the Commission's response to the tariff filing was arbitrary or irrational. Since a Commission rate decision will necessarily be based on a record made some time before, it will always be open to a carrier to contend that there are "changed circumstances" which warrant a new filing. If such allegations alone were sufficient to negate a prescription order we would be right back to the situation rejected in Permian Basin Area Rate Cases, 390 U.S. 747 (1968), in which the carrier may always render nugatory an agency determination by an immediate new tariff filing. As time goes by, the ability of a carrier to demonstrate new and changed circumstances will obviously increase, and the Commission's response necessarily will have to take those allegations into consideration. But the actions of the Commission in the present case described above fully

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9/ AIA Petition for Reconsideration filed March 17, 1975.

met its obligation and cannot possibly be construed as an abuse of its discretion becuase it was insufficiently favorable to AT&T.

Conclusion

For the foregoing reasons, we respectfully urge the Court to deny the petition for review.

Respectfully submitted,

S/ Arthur Scheiner
Arthur Scheiner

S/ Richard A. Solomon
Richard A. Solomon

S/ Robert D. Hadl
Robert D. Hadl

Attorneys for
AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036

May 21, 1975

APPENDIX -- STATUTES INVOLVED

Communications Act of 1934, 48 Stat. 1064, as amended, §§204 and 205:

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any

of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

CERTIFICATE OF SERVICE

I, Robert D. Hadl, certify that I have served a copy of the Brief for Intervenor Aerospace Industries Association of America, Inc., this 21st day of May, 1975, by mail, postage prepaid, on all parties as set forth in the attached list. In addition, copies have been made available to all parties at the office of John Ingle, Federal Communications Commission, 1919 M Street, N. W., Washington, D. C., in accordance with the Preargument Conference Order entered by the Court on April 21, 1975.

S/ Robert D. Hadl
Robert D. Hadl

Ashton R. Hardy, Esquire
Joseph A. Marino, Esquire
John E. Ingle, Esquire
Federal Communications Commission
Washington, D. C. 20554

Thomas E. Kauper, Esquire
Carl D. Lawson, Esquire
Department of Justice
Washington, D. C. 20530

F. Mark Garlinghouse, Esquire
John F. Preston, Jr., Esquire
American Telephone & Telegraph Co.
195 Broadway
New York, New York 10007
Attorney for American Telephone and Telegraph Company

Howard J. Trienens, Esquire (Air Mail)
Jules M. Perlberg, Esquire
One First National Plaza
Chicago, Illinois 60603
Attorney for American Telephone and Telegraph Company

James E. Landry, Esquire
General Counsel
Air Transport Association
1709 New York Avenue, N. W.
Washington, D. C. 20006
Attorney for Air Transport Assoc.

William E. Miller, Esquire
Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorney for Air Transport Assoc.

Charles R. Cutler, Esquire
John L. Bartlett, Esquire
Michael Yourshaw, Esquire
Kirkland, Ellis & Rowe
1776 K Street, N. W.
Washington, D. C. 20006
Attorney for Aeronautical Radio, Inc.

John R. Baskin, Esquire (Air Mail)
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorney for United Press International, Inc.

Aloysius B. McCabe, Esquire
Michael Yourshaw, Esquire
Kirkland, Ellis & Rowe
1776 K Street, N. W.
Washington, D. C. 20006
Attorney for Commodity News Services, Inc., The Associated Press, American Newspaper Publishers Association

Robert P. Kane, Esquire
Attorney General
Commonwealth of Pennsylvania
Capitol Annex
Harrisburg, Pennsylvania 17120
Attorney for Commonwealth of Pennsylvania

Gordon P. MacDougall, Esquire
Special Assistant Attorney General
705 Ring Building
Washington, D. C. 20036
Attorney for Commonwealth of Pennsylvania

Carl S. Rowe, Esquire
Chadbourne, Parke, Whiteside & Wolff
30 Rockefeller Plaza
New York, New York 10020
Attorney for United States Independent Telephone Association

Thomas J. O'Reilly, Esquire
1150 - 17th Street, N. W.
Washington, D. C. 20036
Attorney for United States Independent Telephone Association

George E. Shertzer, Esquire
Richard M. Cahill, Esquire
One Stamford Forum
Stamford, Connecticut 06904
Attorney for General
Telephone Company of
California, et al.

John R. Jones, Esquire (Air Mail)
William H. Schneider, Esquire
Power, Jones & Schneider
100 East Broad Street
Columbus, Ohio 43215
Attorney for General
Telephone Company of
California, et al.

Michael H. Bader, Esquire
Kenneth A. Cox, Esquire
William J. Byrnes, Esquire
Haley, Bader & Potts
1730 M Street, N. W.
Washington, D. C. 20036
Attorney for Microwave
Communications, Inc. and
MCI Telecommunications
Corporation

Roy R. Russo, Esquire
Richard A. Helmick, Esquire
1920 L Street, N. W.
Washington, D. C. 20036
Attorney for Mutual
Broadcasting System, Inc.